83 - 1351

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

ANDRES ALONSO, JR.,

Plaintiff-Appellant and Petitioner,

vs.

UNITED STATES OF AMERICA, DRUG ENFORCEMENT AGENCY; JOHN MARCELLO, Drug Enforcement Agent; and OTHER UNKNOWN DRUG ENFORCEMENT AGENCY Agents,

Defendants-Appellees and Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Plaintiff is an attorney representing a client on pending and potential federal criminal charges. A $150,000 cash retainer fee was being messengered to Plaintiff in sealed envelopes addressed to him. Without a warrant, federal agents intercepted the messenger in a domestic airline terminal, allegedly because he was Latin and appeared nervous, interrogated him as to his immigration status, falsely accused him of drug trafficking and finally obtained his unauthorized "consent" to search Plaintiff's sealed papers. Without a warrant and without the slightest evidence to connect the currency to any criminal conduct whatsoever, the federal agents seized the currency and instituted a forfeiture action against it. Incredibly, the

courts below dismissed Plaintiff's suit for return of his illegally-seized retainer fee and for damages for violation of his civil rights simply because Plaintiff refused to violate the law and his professional ethics by disclosing the name of his client and thereby exposing his client to prosecution for the very crimes to which the government alleges that the retainer fee relates.

The specific Constitutional questions arising in the context of this extraordinary case of governmental interference with the attorney-client relationship are:

1. Does the Fourth Amendment permit federal agents to (a) search sealed envelopes being messengered to an attorney without a warrant after detaining the messenger without cause, interrogating him as to his immigration status, falsely

accusing him of drug trafficking, and finally obtaining his unauthorized "consent" to search the sealed envelopes addressed to the attorney, and then (b) seize the $150,000 cash retainer fee sealed in those envelopes without a warrant and without an iota of evidence to connect that money to any crime whatsoever?

2. Do the Fifth and Sixth Amendments and Rule 37 of the Federal Rules of Civil Procedure permit the dismissal of an attorney's suit for return of his illegally-seized retainer fee and for damages for violation of his civil rights, resulting in the loss of the retainer fee and in the impairment of the attorney-client relationship and Fifth and Sixth Amendment rights of his client, because the attorney refuses to violate the law and professional ethics by disclosing the name of his client and

thereby exposing his client to criminal prosecution for the very crimes to which the government alleges (without proof) that the retainer fee relates?

PARTIES TO THE PROCEEDING IN LOWER COURT

Plaintiff: Andres Alonso, Jr.

Defendants: United States of America

Drug Enforcement Agency

John Marcello

Other Unknown Drug Enforcement Agency Agents

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Plaintiff and Appellant, ANDRES ALONSO, JR., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The unreported memorandum decision of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of Plaintiff's suit is reprinted as Appendix A to this petition.

The unreported order of the United States Court of Appeals for the Ninth Circuit denying Plaintiff's petition for rehearing is reprinted as Appendix B to this petition.

The unreported order dismissing Plaintiff's action by the United States District Court, Central District of California is reprinted as Appendix C to this

petition.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on August 31, 1983. (Appendix A-1.) It denied Plaintiff's petition for rehearing on November 16, 1983. (Appendix B-1.) Plaintiff invokes the jurisdiction of this Court under Title 28, United States Codes, Section 1254(1).

All parties to this proceeding are listed in the caption of the case.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

Federal Rules of Criminal Procedure, Rule 41(e) provides in pertinent part:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property

> was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized . . . . If the motion is granted, the property shall be restored. . . ."

Federal rules of Civil Procedure, Rule 26(b)(1) provides in pertinent part that "Parties may obtain discovery regarding matter, not privileged, which is relevant to the subject matter involved in the pending action."

Federal Rules of Civil Procedure, Rule 37(b)(2) provides in pertinent part, with regard to failure of a party to permit discovery, that the court "may make such orders in regard to the failure as are just."

California Evidence Code, Section 954 provides in pertinent part that an attorney's client "has a privilege to refuse to disclose, and to prevent

another from disclosing, a confidential communication between client and lawyer."

California Evidence Code, Section 955 provides in pertinent part that the "lawyer who received or made a communication subject to the [attorney-client privilege] shall claim the privilege whenever he is present when the communication is sought to be disclosed."

California Business & Professions Code, Section 6068(e) provides in pertinent part that it is the duty of every attorney "to maintain inviolate the confidence, and in every peril to himself to preserve the secrets, of his client."

STATEMENT OF THE CASE

A. The Complaint.

The complaint of ANDRES ALONSO, Jr., against the UNITED STATES OF AMERICA, the DRUG ENFORCEMENT AGENCY and DEA agent JOHN MARCELLO, prays for return of the $150,000 cash retainer fee which Defendants illegally seized and for damages for denial of due process of law and other civil rights.

Original jurisdiction of the District Court was invoked under Title 28, United States Code, Section 1346 (claim against UNITED STATES), Section 2201 (declaratory relief), Section 2202 (injunctive and other relief), Federal Rules of Criminal Procedure, Rule 41(e) (return of illegally-seized property) and general equitable powers of the federal courts. (Mr.

Lucky Messenger Serv, Inc. v. United States, 587 F.2d 15, 16-17 (7th Cir. 1978).)

B. The Denial of Plaintiff's Motion for Return of His Illegally-Seized Retainer Fee.

In the context of this suit, Plaintiff moved for immediate return of the illegally-seized retainer fee. The evidence and admitted facts on his motion showed that DEA agent JOHN MARCELLO saw NELSON VALENCIA get off a commercial airline flight from Miami to Los Angeles. Mr. VALENCIA looked around in the terminal area, walked out to the street carrying a briefcase, looked around again, returned to the baggage claim area, and finally went back to the street and asked a cab driver to take him to a local motel.

Based on nothing more than this, MARCELLO and another DEA agent then

accosted Mr. VALENCIA, interrogated him regarding his immigration status, accused him of being a cocaine courier, and asked to look in the briefcase.

Mr. VALENCIA opened the briefcase and MARCELLO saw two sealed envelopes addressed to Plaintiff in Spanish: "PARA ENTREGAR AL: LICENCIADO ALONSO, TEL: RES 383 0771 OFIC 681 1282." [For delivery to: Attorney Alonso, telephone residence 383 0771 office 681-1282.] MARCELLO asked what was in the envelopes, and Mr. VALENCIA said, truthfully, they were papers for an attorney. MARCELLO asked if he could open the envelopes and warned, "If there is cocaine in the envelopes, I am going to arrest you." Mr. VALENCIA said, "There's no cocaine. Go ahead and open them." MARCELLO opened the envelopes. He found no drugs, but he kept looking and discovered the currency,

which was then seized, although there was not and never has been an iota of evidence that the currency was related to any illegal activity whatsoever.

Thereafter, the UNITED STATES OF AMERICA filed a forfeiture action under Title 21, United States Code, Section 881 alleging that on the date of the seizure, the currency "was furnished or intended to be furnished in exchange for a controlled substance . . . and/or was money traceable to such an exchange, and/or was intended to be used to facilitate a violation of Title 21, United States Code."

Doubting whether Plaintiff had standing to challenge the illegal seizure, the District Court denied his motion for return of his retainer fee.

C. The Order Directing Plaintiff to Reveal the Name of His Client.

Defendants moved for an order compelling Plaintiff to answer questions concerning the identity of the client who sent the currency to him, whether the client had criminal charges brought against him in connection with the matter for which Plaintiff was retained, the terms of the retainer agreement, and other information regarding the source of delivery of the retainer currency.

The District Court ordered Plaintiff to answer most of the questions and advised Plaintiff to state any objection he had to the questions on the record and submit his objections along with his answers to the court in camera.

Plaintiff submitted a declaration to the court in camera in which he answered fully each of the questions

propounded by the Defendants except the questions requiring disclosure of the name of his client. However, Plaintiff fully explained why disclosure of the names would subject the clients to criminal prosecution. Plaintiff gave sufficient information to the court in camera which clearly showed the court that a strong probability existed that disclosure of the names of the clients would implicate said clients in the very criminal activity for which his legal advise was sought.

On August 4, 1982, a hearing was held. The following are some of the relevant statements that were made where the District Court recognized that the Defendants had not made a prima facie case that would have shifted the burden of proof back to the Plaintiff, after the burden of proof shifted to the

defendants, when the Plaintiff raised the attorney-client privilege. However, notwithstanding the District Court's statements, which on the record supported Plaintiff's right to assert the attorney-client privilege, and that the burden of proof had not shifted back to Plaintiff because the Defendants had not made out a prima facie case, the District Court ordered that Plaintiff must disclose the name of the persons who sent the money, where he(they) live, and whether or not he(they) is a client.

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> "THE COURT" I'm just telling you that you do not have to, if any money was received by you for representing somebody else, you don't have to divulge that fact.
>
> Then you have to answer the questions about Nelson Valencia.
>
> MR. ALONSO: I already did, your honor."

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"THE COURT: Apparently, the Lawson case on page 218 says that the attorney may invoke the attorney-client privilege unless the government, in this instance, has made out a prima facie case that the attorney was retained in order to promote or continue criminal or fraudulent activities; so I don't think you have made that out."

Pages 28-29 of Transcript

"MR. MALINSKY: Your Honor, I agree with the Court that the name of the client is privileged if to disclose the name would implicate the client in criminal activity.

What I'm saying is that no such showing has been made by Mr. Alonso.

THE COURT: Just a minute. Just a minute. What you want to do is to find out what clients these attorney's fees were paid by; is that correct?

MR. MALINSKY: Correct.

THE COURT: It's your thinking that that information would not be admissible.

Have you ever prosecuted a criminal case?

MR. MALINSKY: Yes, I have.

THE COURT: When?

MR. MALINSKY: Not in this district.

THE COURT: Well, what kind of cases?

MR. MALINSKY: I was an Assistant United States Attorney in Phoenix, Arizona prosecuting criminal cases, your Honor.

THE COURT: Prosecuting conspiracy cases?

MR. MALINSKY: I can't recall offhand if any of them were conspiracy cases or not.

THE COURT: Well, you cannot see that when a person pays fees for another where there's a criminal activity in the field of drugs, that that could not be considered to be an act in furtherance of the conspiracy?"

Pages 30-32 of Transcript

"THE COURT: I would imagine that we are not concerned about anything other than the evidence, but I would just imagine, particularly in view of the filing of this other case, the forfeiture case, that you or somebody has the suspicion that these moneys were sent for illegal purposes; so you say that as far

as his client is concerned, that he doesn't have the right to exercise the Sixth Amendment privilege.

Well, there's a Ninth Circuit case that holds that he does, you know, and it's the case of -- maybe you know the name. It's Stacher, S-t-a-c-h-e-r. It was decided in, I think it was, late '62 or early '63, and it held that the lawyer could assert the Sixth Amendment privilege for his absent client.

I know because I was a U.S. Attorney, and I remember what the decision of the Court of Appeals in reversing was.

MR. MALINSKY: Your Honor, the fact that that other lawsuit has been filed does not -- it does not necessarily follow from that that the money is to be used for an illegal purpose.

THE COURT: Well, I know, but at least you or somebody took the liberty of certifying to the Court because every time that a lawyer signs a pleading, he certifies to the Court that it is filed in good faith.

MR. MALINSKY: I'm not saying that it wasn't. That's not the only basis for forfeiting the money, however.

THE COURT: What's the allegation say of the complaint?

MR. MALINSKY: It charges a violation of 21 United States Code Section 881 which pertains to facilitating the sale of a controlled substance or to forfeit any goods derived from the sale of controlled substances.

THE COURT: Forfeit any goods?

MR. MALINSKY: Property, money obtained as a result of the illegal profits from the sale of controlled substances.

In other words, if the --

THE COURT: It has to be the same money.

MR. MALINSKY: If a drug trafficker derives money from the sale of narcotics and buys a home with it --

THE COURT: Well, supposing he has.

MR. MALINSKY: -- that's forfeitable.

THE COURT: How do you expect to prove this is the precise money? It has to be the same money, according to my recollection.

Well, that's another case, but the point is that it just shows you that -- anyway, I'm holding that he does not have to answer -- and let me read this case of Lawson at page 218, Arabic 4, where it says,

(Reading:)

'In this case, the names of appellant's undisclosed clients and fee arrangements involving other conspirators would implicate those persons in the past conspiracy.'

So he doesn't have to tell, in the absence of any showing, that there is any evidence of a prima facie case of continuing illegal activity when the Sixth Amendment privilege is properly taken, but he must disclose the name of his client who allegedly has sent him the money.

When will you be present for the further taking of the deposition, Mr. Alonso?

MR. ALONSO: Tomorrow."

D. Dismissal of Plaintiff's Action.

Plaintiff declined to reveal the name of his client. He asserted the attorney-client privilege and the Fifth Amendment and Sixth Amendment rights of his client, and advised that he had been instructed by his client that under no circumstances was his name to be revealed.

Defendants filed a motion to dismiss the complaint on the grounds that Plaintiff refused to comply with discovery. Despite the fact that the UNITED STATES GOVERNMENT was claiming that the seized currency was related to an illegal drug sale, and despite the fact that the identity of the client was at best only marginally relevant to the case (no one seriously could doubt that Plaintiff was the intended recipient of

the currency), the District Court nevertheless concluded that Plaintiff was obliged to disclose the name of his client and therefore link his client to the money and the alleged criminal conduct.

Solely because Plaintiff refused to breach his obligations to his client, the District Court dismissed his action:

> "It appearing to the Court that whether the plaintiff is the owner of the $150,000 which he seeks to recover is a material issue in the case and that plaintiff has refused to disclose the name and address of the client who allegedly transmitted the funds through one NELSON VALENCIA as payment for legal services rendered and to be rendered by plaintiff, though ordered to do so by the Court, and the Court being fully advised in the premises,
>
> "IT IS HEREBY ORDERED that the motion to dismiss is granted." (Appendix C-1-2.)

E. The Affirmance of the Dismissal without Ruling on the Illegal Search and Seizure.

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal in a memorandum opinion which did not even mention the denial of Plaintiff's motion for return of the illegally-seized property. The Court affirmed the dismissal solely because Plaintiff refused to disclose his client's identity. The Court concluded, contrary to the indisputable facts, that Plaintiff had failed to show that a "strong probability exists that disclosure of such information would implicate the client in the very criminal activity for which legal advice was sought." (Appendix A-1-2.)

REASONS FOR GRANTING THE PETITION

A criminal defendant's right to effective assistance of counsel is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." (Powell v. Alabama, 287 U.S. 45, 67, 53 S.Ct. 55, 63, 77 L.Ed. 158 (1932).)

That right is hollow, however, if the defendant effectively can be barred from compensating counsel of his choice as a result of government interference with the delivery of the retainer fee and practically can be prevented from consulting freely with that counsel about pending and potential criminal charges because of fear the attorney can be coerced to reveal the defendant's identity.

As we now demonstrate, that right to counsel was rendered meaningless in

exactly these ways by the actions of federal agents and the rulings of the federal courts in this case.

I

UNDER THE FOURTH AMENDMENT, AN ATTORNEY WHO IS THE INTENDED RECIPIENT OF A CASH RETAINER FEE FOR REPRESENTATION OF A CRIMINAL DEFENDANT IS ENTITLED TO THE RETURN OF HIS FEE FROM FEDERAL AGENTS WHERE THE FEE IS SEIZED BY THOSE AGENTS, WITHOUT A WARRANT, FROM A MESSENGER WHO WAS DETAINED, INTERROGATED, AND FALSELY ACCUSED WITHOUT PROBABLE CAUSE, AND FORCED TO GIVE UNAUTHORIZED CONSENT TO SEARCH SEALED LEGAL PAPERS ADDRESSED TO THE ATTORNEY, AND WHERE THERE IS NO EVIDENCE WHATSOEVER THE CASH RELATES TO ANY CRIMINAL ACTIVITY.

The denial of Plaintiff's motion for return of his illegally-seized $150,000 retainer flies in the face of the Fourth Amendment. Until now, the standard of probable cause under the Constitution was

the probability of criminal activity. (Illinois v. Gates, ____ U.S. ____, 103 S.Ct. 2317, 2326 (1983); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969).) But the courts below apparently believe that mere speculation of criminal activity is sufficient to deprive a citizen of his constitutional rights.

At every step of the detention, interrogation, search and seizure, the conduct of the federal agents was demonstrably improper. First, the messenger was accosted by the federal agents based on the mere fact that he appeared to be a nervous-looking Latin man who got off a flight from Miami to Los Angeles with a briefcase, went to the baggage claim area and then to the street where he asked a cab driver to take him to a motel. There was nothing to distinguish the messenger from virtually any other Miami

airline passenger arriving at a busy and unfamiliar airline terminal. No detention is justified merely because a suspect fits a few of the informal characteristics of a "drug courier profile." (Reid v. Georgia, 448 U.S. 438, 439-441, 100 S.Ct. 2752, 2753-2754 (1980); United States v. Berry, 670 F.2d 583, 588 (5th Cir. 1982).) To approve such a detention and interrogation would effectively authorize the roust of almost any airline passenger. The Constitution clearly does and should require more than this. (See, Florida v. Royer, 460 U.S. ____, 103 S.Ct. 1319 (1983).)

Second, there could be no valid consent to search the sealed envelopes addressed to Plaintiff. A messenger has no legal authority to consent to the opening of sealed documents addressed to someone else. (United States v. Pressler, 610 F.2d 1206, 1213 (4th Cir. 1979);

United States v. Kelly, 529 F.2d 1365, 1371-1372 (8th Cir. 1976); Corngold v. United States, 367 F.2d 1, 6-10 (9th Cir. 1966).)

Third, the messenger's consent, even if he gave it, could not have been voluntary. He had no option to refuse to cooperate with his interrogators. (Cf. United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1977 (1980).) By challenging the messenger's immigration status and accusing him of drug trafficking, the federal agents gave the messenger no meaningful choice to do anything but consent to a search or risk his personal freedom. (Smith v. Rhay, 419 F.2d 160, 163 (9th Cir. 1969).)

Fourth, even if there was a valid consent to search, it was a consent to search for drugs, not for private papers or money. (United States v. Dichiarinte,

445 F.2d 126, 129-130 (7th Cir. 1971).) As soon as the federal agents saw that the briefcase and sealed envelopes did not contain drugs, which was the purported basis for their search, that should have been the end of that search.

Finally, whatever excuse they had for searching the two sealed envelopes, the federal agents still had absolutely no basis for seizing Plaintiff's currency inside. They knew only that the money was addressed to and intended for delivery to Plaintiff, an attorney. The messenger said he knew nothing about the money and had no interest in it. The agents therefore had not the slightest ground for seizing that money or even suspecting that it was involved in an illegal transaction of any kind, much less in drug trafficking in violation of federal laws. Money is not ordinarily contraband, and the federal

agents had absolutely no reasonable basis for believing that it was contraband in this case.

Plaintiff, as owner of the illegally-seized currency, had a reasonable expectation of privacy and a constitutionally protected interest in it. (United States v. Cella, 568 F.2d 1268, 1280 (9th Cir. 1977).) Even if he was not the owner of the currency, he still had a reasonable expectation of privacy in the sealed envelopes addresssed to him. (Rakas v. Illinois, 438 U.S. 129, 143, 99 S.Ct. 421, 430, fn. 12 (1978); Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841 (1981).) This Court has recently reaffirmed "the general principle that closed packages and containers may not be searched without a warrant." (United States v. Ross, ____ U.S. ____, 102 S.Ct. 2157, 2166 (1982); United States v.

Chadwick, 443 U.S. 1, 11, 97 S.Ct. 2476, 2483 (1977); (United States v. Van Leeuwen, 397 U.S. 249, 251, 90 S.Ct. 1029 (1970).)

In short, the facts here show nothing more than a roust by overzealous federal agents who think any Latin person who looks nervous is fair game for detention, interrogation, and search, and that sealed envelopes addressed to attorneys can be opened and searched at will. This is not and cannot be the law. Plaintiff's Constitutional rights and reasonable expectation of privacy were violated by the Defendants, and he should be entitled to the prompt return of his illegally-seized property.

II

UNDER THE FIFTH AND SIXTH AMENDMENTS AND RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AN ATTORNEY'S SUIT AGAINST THE GOVERNMENT FOR RECOVERY OF HIS ILLEGALLY-SEIZED RETAINER FEE AND FOR DAMAGES FOR VIOLATION OF HIS CIVIL RIGHTS SHOULD NOT BE DISMISSED AS PUNISHMENT FOR THE ATTORNEY OBEYING HIS LEGAL AND ETHICAL DUTIES NOT TO DISCLOSE THE NAME OF HIS CLIENT IN AN UNRELATED CRIMINAL CASE AND THEREBY SUBJECT HIS CLIENT TO FURTHER CRIMINAL PROSECUTION.

This Court has previously recognized the constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. (Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897); Hammond Packing Co. v. State of Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530

(1909).) Rule 37 of the Federal Rules of Civil Procedure, which authorizes the courts to penalize a failure to comply with discovery, must be read in light of the Fifth Amendment mandate that no person shall be deprived of property without due process of law. (Societe Internationale v. Rogers, 357 U.S. 197, 209, 78 S.Ct. 1089, 1094 (1958).)

Plaintiff submits that the ultimate sanction in a civil case, dismissal of the action, "should be the rare judicial act," used only when a failure to comply with discovery has been due to willfulness, bad faith or fault of the litigant. (Edgar v. Slaughter, 548 F.2d 770, 772 (8th Cir. 1977); Dunn v. Transworld Airlines, Inc., 589 F.2d 408, 415 (9th Cir. 1978); Backos v. United States, 82 F.R.D. 743 (E.D. Mich. 1979).)

In this case, Plaintiff had no choice but to claim the attorney-client privilege on behalf of his client. (California Evidence Code, Section 955.) Indeed, Plaintiff could not waive the privilege even if he wanted to. The privilege is not his under California law; it belongs exclusively to his client. (California Evidence Code, Section 954.) His client, justifiably fearing government retribution, has expressly instructed Plaintiff not to reveal his name.

Moreover, Plaintiff is mandated by other California law to "maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." (California Business & Professions Code, Section 6068(e).) Plaintiff would subject himself to civil liability and professional sanction from the State Bar for violating the privilege,

by revealing the name of his client, and exposing his client to criminal prosecution.

Although this Court has not so ruled, it is the consensus that "the identity of a person who seeks the advice of a qualified attorney, on a matter which includes that person's potential criminal exposure, where the mere disclosure of the person's identity would tend to incriminate for past criminal acts, is protected by the attorney-client privilege." (In re Grand Jury Proceedings, 663 F.2d 1057, 1061 (5th Cir. 1981); Liew v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981); in re Grand Jury Proceedings, 600 F.2d 215, 218-219 (9th Cir. 1979); United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977); In re Grand Jury Proceedings, 517 F.2d 666, 671 (5th Cir. 1975); Tillotson v. Boughner, 350 F.2d 663, 666

(7th Cir. 1965); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).)

Contrary to the unreasoned conclusion of the Court of Appeals, there can be no doubt that disclosure of the name of the client would subject the client to criminal prosecution. Indeed, in a related action, the UNITED STATES GOVERNMENT itself seeks forfeiture of the currency, alleging it was in fact "furnished or intended to be furnished in exchange for a controlled substance . . . and/or was money traceable to such an exchange, and/or was intended to be used to facilitate a violation of Title 21, United States Code."

Neither Plaintiff nor the messenger has committed or even been charged with any crime relating to the currency. The only person left who had anything to do with the currency was his client, the person who sent or caused it to be sent

to Plaintiff. The government therefore must believe it is Plaintiff's client who was trafficking in drugs. Disclosure of the name of the client would necessarily subject him to prosecution for the very crimes which the government alleges was associated with the currency.

Privileged information is not subject to discovery. (Federal Rules of Civil Procedure, Rule 26(b)(1); United States v. Reynolds, 345 U.S. 1, 6, 73 S.Ct. 528, 531 (1953).) Plaintiff therefore should not have been punished at all, much less indirectly fined $150,000 by dismissal of his action, for asserting the privilege on behalf of his clients as he was required to do by law and professional ethics.

Furthermore, no consideration has apparently been given to any lesser sanction than dismissal. The identity of

Plaintiff's client, if it was material at all, was material only to the issue of the source of Plaintiff's money and not at all material to the validity of the seizure of the currency or to Plaintiff's present right to claim the money. There was ample other evidence on the issue of Plaintiff's ownership of the currency. No one else has ever come forward to claim the currency. The government has no legitimate concern that some unknown third party might be affected by the return of the money to Plaintiff. (United States v. Palmer, 565 F.2d 1063 (9th Cir. 1977) [". . . in the absence of any cognizable claim of ownership or right of possession adverse to that of appellant, the District Court should have granted appellant's motion and returned to him the money taken from him by government seizure."].) It is therefore unreasonable to throw out

Plaintiff's case merely because he was forced to claim the attorney-client privilege on this one issue.

CONCLUSION

The actions of the federal agents and the federal courts in this case have placed Plaintiff in a "Catch-22" situation, forcing him to trade one set of Constitutional rights against another. If Plaintiff stands by his clients, and by his ethical and legal obligations to his clients, as every attorney should do, then the government reaps the double windfall of retaining $150,000 which belongs to Plaintiff and also seriously undermines the ability of Plaintiff's clients to obtain effective legal representation in pending and potential criminal prosecutions. If, on the other hand, Plaintiff reveals the names of his clients, the government will have successfully subverted the civil discovery process to obtain information for criminal prosecutions, and

no criminal defendant will ever again be able to fully place his trust in his attorney.

The District Court's orders placing Plaintiff in this unfair and untenable position, and the judgment of the Court of Appeals affirming those orders, should be reversed.

Respectfully submitted,

Law Offices of
ANDRES ALONSO, JR.

By _____
Andres Alonso, Jr.
Attorneys for Plaintiff,
Appellant, and Petitioner

APPENDIX A

APPENDIX A

ANDRES ALONSO, JR.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; DRUG ENFORCEMENT AGENCY; JOHN MARCELLOS, Drug Enforcement Agent; AND OTHER UNKNOWN DRUG ENFORCEMENT AGENCY Agents,
Defendants-Appellees.

No. 82-6017
D.C. No. CV 82-898-FW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Appeal from the United States District Court for the Central District of California.

Hon. Francis C. Whelan, Senior U.S. District Judge, Presiding

Argued and Submitted July 8, 1983

Before: Alarcon and Norris, Circuit Judges, and EAST,* District Judge.

MEMORANDUM

Filed: August 31, 1983

*/ The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

We affirm the district court's dismissal on the ground that Alonso refused to disclose his client's identity. The identity of an attorney's client ordinarily does not fall within the attorney-client privilege, see, e.g., In re Michaelson, 511 F.2d 882, 888 (9th Cir.), cert. denied, 421 U.S. 978 (1975), and cases cited therein. Our inspection of the materials Alonso presented to the district court in camera also demonstrates that Alonso has failed to prove that his client's identity falls within the exception to the general rule: that the name of a client need not be disclosed where a "strong probability exists that disclosure of such information would implicate the client in the very criminal activity for which legal advice was sought." United States v. Hodge and Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977),

citing Baird v. Koerner, 279 F.2d 623, 630 (9th Cir. 1960) (attorney need not disclose to government name of delinquent taxpayer). The district court thus did not abuse its discretion in ordering Alonso to reveal the name of his client and in dismissing the suit on Alonso's failure to comply.

AFFIRMED.

APPENDIX B

APPENDIX B

ANDRES ALONSO, JR.,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, DRUG ENFORCEMENT AGENCY; JOHN MARCELLOS, Drug Enforcement Agent; and other unknown Drug Enforcement Agency agents,
Defendants-Appellees.

No. 82-6017
DC# CV 82-898-FW
Central California

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Alarcon and Norris, Circuit Judges; EAST,*
District Judge.

ORDER

Filed: November 16, 1983

Appellant's petition for rehearing is denied.

*/ The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

APPENDIX C

ANDRES ALONSO, JR.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
et al.,
Defendants.

No. CV 82-0898-FW

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ORDER DISMISSING ACTION

Filed: November 1, 1982

Entered: November 2, 1982

The defendants' Motion to Dismiss Complaint; Motion to Compel Discovery; Motion for Service of Copy Upon Defendants of In Camera Filing by Plaintiff, and Motion to Continue Trial was heard by the Court on October 27, 1982. The plaintiff appeared by his attorney Robert J. Jagiello and the defendants appeared by their attorney,

the United States Attorney, by Assistant United States Attorney Philip S. Malinsky. It appearing to the Court that whether the plaintiff is the owner of the $150,000 which he seeks to recover is a material issue in the case and that plaintiff has refused to disclose the name and address of the client who allegedly transmitted the funds through one Nelson Valencia as payment for legal services rendered and to be rendered by plaintiff, though ordered to do so by the Court, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the motion to dismiss is granted.

IT IS FURTHER ORDERED that this action is dismissed with prejudice on the ground the plaintiff has refused to submit to discovery upon a material issue and that defendants shall recover their costs.

IT IS FURTHER ORDERED that, in view of the Court's ruling on the motion to dismiss, defendants' other motions are moot and need not be decided by the Court.

Dated: This 29th day of October, 1982.

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE

Presented by:

STEPHEN S. TROTT
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ Philip S. Malinsky
PHILIP S. MALINSKY
Assistant United States Attorney
Attorneys for Defendants